

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

LARRY GRAVES,  
Appellant,  
  
v.

DEPARTMENT OF VETERANS AFFAIRS,  
Agency.

DOCKET NUMBERS  
DA-0752-95-0614-I-1  
DA-0752-95-0614-C-2

DATE: APR 28 1999

Larry Graves, Houston, Texas, pro se.

Carlos Osegueda, Houston, Texas, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

Vice Chair Slavet concurs in the result.

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review from the August 17, 1995 initial decision in MSPB Docket No. DA-0752-95-0614-I-1 that dismissed his appeal as settled. For the reasons set forth below, we DISMISS that petition for review as untimely. To the extent the appellant has petitioned for review of the July 21, 1998 initial decision in MSPB Docket No. DA-0752-95-0614-C-2 that dismissed his petition for enforcement as withdrawn, we DENY any such petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115.

## BACKGROUND

¶2 On May 16, 1995, the appellant filed a Board appeal from the agency's action suspending him for 30 days effective April 17, 1995, on the charge of "[d]isrespectful and threatening conduct toward a supervisor." *See* Initial Appeal File (IAF), MSPB Docket No. DA-0752-95-0614-I-1, Tab 1 and Tab 4, Subtab 4k. On July 11, 1995, the parties entered into a written settlement agreement which, among other things, "mitigate[d] [the appellant's] 30 calendar day suspension to a 21 calendar day suspension." *Id.*, Tab 9. The administrative judge dismissed the appeal as settled, finding in her July 13, 1995 initial decision that the agreement was lawful, and that the parties freely entered into it and understood its terms. *See id.*, Tab 10. The administrative judge informed the parties that they could seek review of the initial decision if they believed that the settlement agreement was unlawful, involuntary, or the result of fraud or mutual mistake, and she advised them that a petition for review from that initial decision must be filed on or before August 17, 1995. *See id.*

¶3 On April 19, 1998, the appellant filed a pleading with the Board's Dallas Field Office stating that, in the course of reviewing his Official Personnel File (OPF) on March 17, 1998, he discovered that a Standard Form (SF) 50-B documenting the "mitigation" of the 30-day suspension to a 21-day suspension listed the reason for the suspension as absence without leave (AWOL), rather than "making threatening remarks to a supervisor." Compliance Appeal File (CAF), MSPB Docket No. DA-0752-95-0614-C-2, Tab 1. The appellant requested that the Board declare the settlement agreement "null and void" on the ground that the agency used the settlement agreement to place a "false charge" in his OPF. *Id.* The field office docketed the request as a petition for enforcement. *See id.*, Tab 2.

¶4 In a July 10, 1998 conference call with the administrative judge, the appellant, who was represented by a union official, claimed that the settlement agreement

was the result of fraud, and that he wished to withdraw his petition for enforcement and file a petition for review with the Board. *See id.*, Tab 7. In a July 21, 1998 initial decision, the administrative judge dismissed the petition for enforcement as withdrawn. *See id.*, Tab 8.

¶5 In a petition for review filed on August 6, 1998, the appellant alleges that the agency "engaged in fraud" by entering into the settlement agreement and then placing the SF-50-B in his OPF showing the reason for the suspension as AWOL. Petition for Review File (PFRF), Tab 1. He asks the Board to "investigate the charge of 'Fraud.'" *Id.*

¶6 Since it appeared that the appellant was challenging the July 13, 1995 initial decision that dismissed the underlying appeal as settled, the Board issued a February 4, 1999 show-cause order asking that he explain the reason for the late filing of his petition. *See id.*, Tab 5. The appellant filed a timely response to the Board's show-cause order. *See id.*, Tab 6.

### ANALYSIS

¶7 Before she issued her July 21, 1998 initial decision dismissing the petition for enforcement as withdrawn, the administrative judge prepared a summary of the July 10, 1998 status conference. *See CAF*, Tab 7. In her summary, the administrative judge stated that the appellant notified her that he wished to withdraw his petition for enforcement, that he believed the settlement agreement was the result of fraud, and that he intended to file a petition for review with the Board. *See id.* The administrative judge gave the parties an opportunity to object to or supplement the summary. *See id.* The appellant neither objected to nor supplemented the administrative judge's summary of the conference. Moreover, on petition for review, he does not dispute the administrative judge's summary of the July 10, 1998 conference or her decision to dismiss his petition for enforcement as withdrawn.

¶8 Withdrawal of an appeal is an act of finality that removes the appeal from the Board's jurisdiction, and the Board will give effect to the withdrawal of an appeal absent unusual circumstances such as misinformation or new and material evidence and will not reinstate an appeal merely because an appellant wishes to proceed before the Board. *Wolfe v. Department of the Army*, 77 M.S.P.R. 175, 179, *review dismissed*, 152 F.3d 945 (Fed. Cir. 1998) (Table). Here, the appellant has given us no reason to believe that he did not intend to withdraw his petition for enforcement and file a petition for review of the July 13, 1995 initial decision. On the contrary, the Board's February 4, 1999 show-cause order apprised the appellant that if he wanted to challenge the July 13, 1995 initial decision by arguing that the settlement agreement was invalid due to fraud, he needed to submit a statement showing good cause for the late filing of his petition for review of that initial decision. *See* PFRF, Tab 5. The appellant's sworn response to the show-cause order indicates his intent not to pursue a petition for enforcement, but instead to claim that the agency was acting in bad faith when it entered into the settlement agreement. *See id.*, Tab 6. Thus, we find that the appellant has shown no error in the administrative judge's July 21, 1998 initial decision dismissing the docketed petition for enforcement as withdrawn. Thus, to the extent he may be petitioning for review of that initial decision, we deny his petition. *See* 5 C.F.R. § 1201.115.

¶9 On April 19, 1998, the appellant filed his first pleading with the field office on the matter of the agency's alleged fraud. *See* CAF, Tab 1. If we accept this date as the date the appellant filed his petition for review from the July 13, 1995 initial decision, the petition would still be filed over two-and-one-half-years late under the regulations in effect when the initial decision was issued. *See* 5 C.F.R. § 1201.114(d) (1995). To establish good cause for the delay in filing, the appellant must show that he exercised due diligence or ordinary prudence under

the particular circumstances of his case. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

¶10 In response to the Board's show-cause order, the appellant states that he did not check his OPF or agency records after the parties executed the settlement agreement to see what reason was shown for the suspension because he was "acting in good faith and believed that the agency was doing the same." PFRF, Tab 6. He states that he checked his OPF on March 17, 1998 for the purpose of responding to a set of interrogatory questions and noticed that the documentation for the suspension imposed after the settlement agreement showed AWOL, rather than threatening a supervisor, as the misconduct. *Id.* He claims that "[i]t was at that time that [he] learned that [his] record had been falsified." *Id.*

¶11 The discovery of new evidence may establish good cause for the untimely filing of a petition for review "if the evidence was not readily available before the close of the record below, and if it is of sufficient weight to warrant an outcome different from that of the initial decision." *Satterfield v. U.S. Postal Service*, 80 M.S.P.R. 132, ¶ 5 (1998) (citation omitted). Where the initial decision dismissed an appeal as settled, newly-discovered evidence would warrant a different outcome, thus establishing good cause for an untimely petition for review, if the evidence shows that the settlement agreement was invalid. *See id.*

¶12 The appellant states that on March 17, 1998 he discovered the SF-50-B with the reference to AWOL as the reason for the suspension, and that he then came to believe that the agency had entered the settlement agreement in bad faith with the intent of falsifying his personnel record. *See* PFRF, Tab 6. However, as noted above, he waited until April 19, 1998 to file a pleading with the field office on the matter of the alleged bad faith and fraud. *See* CAF, Tab 1. The appellant does not explain why he waited for over a month to file a pleading with the Board regarding his claim of fraud. For this reason alone, we find that he has not established good cause for the late filing of his petition for review. *Accord, e.g.,*

*Cassidy v. U.S. Postal Service*, 65 M.S.P.R. 86, 89 (1994) (appellant who delayed filing a petition for review for 5 weeks after becoming aware of the alleged grounds for requesting Board review did not show good cause for excusing the late-filed petition); *Bautista v. Department of Defense*, 63 M.S.P.R. 177, 179 (1994) (appellant did not establish good cause for the delay in filing where he failed to explain why, after he did not receive the new SF-50 by the date promised under the settlement agreement, he waited a month after receipt of the new SF-50 to file a petition for review). There are additional reasons for finding that the appellant did not show good cause to waive the filing deadline.

¶13 The record evidence shows that the SF-50-B for the 30-day suspension that led to the underlying Board appeal erroneously showed AWOL as the reason for the action. *See* IAF, Tab 6, Subtab 4d. That SF-50-B was in the record before the settlement agreement was reached and before the July 13, 1995 initial decision was issued. *See id.*, Tabs 6, 9, and 10. The agency asserted that, in accord with the settlement agreement, it issued a new SF-50-B on October 25, 1995, that the post-settlement SF-50-B changed the time of the suspension from 30 to 21 days, but that the new SF-50-B merely copied the erroneous reference to AWOL from the pre-settlement SF-50-B. *See* CAF, Tab 5, Subtab 1.

¶14 Thus, the pre-settlement SF-50-B showing AWOL as the reason for the 30-day suspension was in the record and available to the appellant before he entered into the settlement agreement. Yet, the appellant has not alleged that either he or his union representative sought to verify at any time before March 17, 1998 (almost 3 years after the settlement agreement was executed) whether the SF-50-B issued as a result of the settlement agreement corrected the error that was in the pre-settlement SF-50-B, namely, the error in showing AWOL as the alleged misconduct. Thus, although some delay in filing a petition for review may have been excusable under the circumstances since the agency did not issue the post-settlement SF-50-B until after the time for filing a petition for review from

the July 13, 1995 initial decision had elapsed, we are not persuaded that there is good cause to excuse a delay of over two-and-one-half years when neither the appellant nor his union representative claims to have made any attempts before March 17, 1998 to check whether the error on the pre-settlement SF-50-B showing AWOL was corrected on the post-settlement SF-50-B. *See Vasquez v. U.S. Postal Service*, 65 M.S.P.R. 128, 132 (1994); *Armstrong v. Office of Personnel Management*, 36 M.S.P.R. 37, 41 (1987); *cf., e.g., As'Salaam v. U.S. Postal Service*, 65 M.S.P.R. 417, 421 (1994) (appellant exercised due diligence when he reviewed his OPF less than 3 months after receiving information on his workers' compensation claim to see if the agency had corrected his personnel records to reflect his receipt of workers' compensation benefits, as it had promised to do under the settlement agreement), *appeal dismissed*, 47 F.3d 1184 (Fed. Cir. 1995) (Table).

¶15 Further, even assuming that the appellant had no obligation under these circumstances to check his OPF any earlier than March 17, 1998 to see if a corrected SF-50-B had been issued pursuant to the settlement agreement, he has not otherwise shown good cause for waiver of the filing deadline. He alleges that the agency entered into the settlement agreement so it could place a "false charge" (AWOL) in his OPF. CAF, Tab 1. However, as noted above, AWOL was erroneously shown on the pre-settlement SF-50-B as the reason for the 30-day suspension. Thus, if the agency wanted to place a "false charge" of AWOL in the appellant's OPF, as he claims, it did not have to enter into a settlement agreement to do so since the pre-settlement SF-50-B already showed AWOL as the reason for the suspension. In addition, because the settlement agreement does not state what reason should be shown for the "mitigated" suspension, we fail to see where the agency acted in bad faith or breached the agreement when it issued the SF-50-B with the notation of AWOL. *See* IAF, Tab 9. Moreover, the appellant does not challenge the agency's statement that upon learning of the error in the

post-settlement SF-50-B, it took action on April 15, 1998 to issue an SF-50-B that did not show AWOL as the reason for the action. *See* CAF, Tab 4, Subtab 1. Accordingly, we find that even if we were to consider the post-settlement SF-50-B to be newly-discovered evidence, it would not support a finding that the settlement agreement was invalid based on fraud. *See generally Bowie v. U.S. Postal Service*, 72 M.S.P.R. 42, 44 (1996) (party challenging the validity of a settlement agreement bears a heavy burden of showing a basis for invalidating the agreement), *appeal dismissed*, 129 F.3d 133 (Fed. Cir. 1997) (Table). Because this evidence does not warrant a different outcome, it does not establish good cause to excuse the late filing of the petition for review. *See Dull v. Department of the Navy*, 76 M.S.P.R. 31, 35 (1997); *Melendez v. Department of Veterans Affairs*, 73 M.S.P.R. 1, 4-5 (1996). For all of the above reasons, we dismiss the appellant's petition for review as untimely filed.

#### ORDER

¶16 This is the final order of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decisions will remain the final decisions of the Board with regard to the dismissal of the appeal as settled and the dismissal of the petition for enforcement as withdrawn. 5 C.F.R. § 1201.113(c).

#### NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439



The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.